

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-709

18-P-568

ISHMA'EL A-R DAA'QAADIR, petitioner  
(and a companion case<sup>1</sup>).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Ibrahim Abdul Malik<sup>2</sup> appeals from (1) the denial of his motion for new trial with respect to the 2004 adjudication after bench trial as a sexually dangerous person (SDP) and commitment to the Massachusetts Treatment Center (MTC) and (2) the 2014 judgment after jury trial, determining that he remains a sexually dangerous person (SDP) and should remain committed to the MTC.<sup>3</sup> As both appeals raise the same interrelated issues, we consider them together.

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<sup>1</sup> Commonwealth vs. Courtney P. Lynch.

<sup>2</sup> The appellant was convicted of a sex offense and committed as a sexually dangerous person pursuant to G. L. c. 123A, § 12, while named Courtney P. Lynch. He changed his name to Ishma'el Abdur-Rasheed Daa'Qaadir in 2005 and later petitioned for discharge pursuant to G. L. c. 123A, § 9. In 2012 he again changed his name to Ibrahim Abdul Malik. We refer to the appellant as "Malik."

<sup>3</sup> The initial SDP determination and order of commitment was affirmed on appeal. See Commonwealth v. Lynch, 70 Mass. App. Ct. 22 (2007). Malik did not file his motion for new trial from this proceeding until after he filed an appeal from the 2014

Malik argues that records from his years in residential treatment facilities as a juvenile in the custody of the Department of Social Services (juvenile records) were erroneously produced, provided to the Commonwealth's experts, and admitted in evidence in the initial commitment proceeding, prejudicing his subsequent petition for discharge. Without these records, he asserts, the Commonwealth would have been unable to sustain its burden of proving that he was an SDP in 2004, and remained an SDP in 2014. After review, we affirm the denial of his motion for new trial and the judgment requiring his continued confinement.

Discussion. 1. Motion for new trial. With respect to the 2004 trial regarding initial SDP determination and commitment, Malik contends that a new trial is required because his statutory and constitutional rights were violated by the disclosure, use, and admission in evidence at trial of juvenile records, which contained privileged communications. This argument was also raised on direct appeal. See Commonwealth v. Lynch, 70 Mass. App. Ct. 22, 30 (2007). There, we noted that the records were produced for all parties without objection prior to the probable cause hearing, such that "[a]ny privilege attaching to these records was waived." Id. As the issue was

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judgment. That appeal was stayed pending resolution of the motion for new trial.

already raised and decided on direct appeal, it may not be relitigated in the guise of a motion for new trial.<sup>4</sup> See Commonwealth v. Rodriguez, 443 Mass. 707, 709-711 (2005) (direct estoppel bars relitigation of claims that were actually decided in same case). The motion for new trial was properly denied.

2. Petition for discharge. With respect to the 2014 trial regarding continuing SDP status and commitment, Malik contends that the trial judge erred in denying his pretrial motion to exclude the juvenile records from evidence on the basis that this court had previously determined that any privilege was waived. Without deciding whether the privilege issue should have been considered anew, we conclude that the showing made by Malik was insufficient. "The existence of a claimed privilege is essentially a question of fact for the trial judge" (citations omitted). Miller v. Milton Hosp. & Med. Ctr., 54 Mass. App. Ct. 495, 498-499 (2002). The party asserting the privilege carries the burden of establishing that it applies.

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<sup>4</sup> In this appeal, Malik urges this court to nevertheless readdress the issue because "the Appeals Court's determination that [Malik] did not object to the production of these records has insufficient support in the record, and a substantial showing has been made in [Malik's] motion for new trial that the issue is contested." Yet, in his memorandum in support of his motion for new trial, Malik acknowledges that his counsel did not object to the production of the records. Further, counsel's affidavit in support of the motion for new trial asserts only a lack of memory as to the issue. This showing does not raise a substantial issue requiring an evidentiary hearing. See Commonwealth v. Stewart, 383 Mass. 253, 257 (1981).

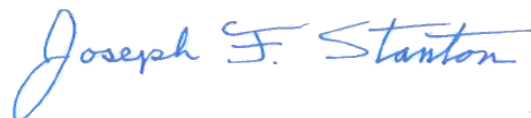
Id. Here, Malik failed to identify the specific portions of the records asserted to be privileged and to identify the nature of the privilege. Instead, he argued generally that all of the juvenile records were privileged and inadmissible. Given that Malik failed to sustain his burden of establishing privilege in the first instance, the trial judge did not err in denying the motion.

Nor can we say that the Commonwealth would have been unable to prove sexual dangerousness in 2014 without Malik's juvenile records predating his sexual offense in 1988. See Matter of Chapman, 482 Mass. 1012, 1014 (2019) (Commonwealth's burden is to present evidence of present sexual dangerousness). There was ample evidence of sexual dangerousness presented through other sources, including records from his commitment at the MTC. We therefore see no basis for disturbing the judgment.

Judgment entered September  
29, 2014, affirmed.

Order dated February 5, 2018,  
denying motion for new  
trial affirmed.

By the Court (Sullivan,  
Singh & Englander, JJ.<sup>5</sup>),



Clerk

Entered: August 13, 2019.

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<sup>5</sup> The panelists are listed in order of seniority.